SUMMARY OF COOPERATIVE CASES

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RESTRAINT OF TRADE - PRICE DISCRIMINATION

(In the Matter of Central Arkansas Milk Producers Association, Inc., and David L. Parr, FTC Docket No. 8391)

In an initial decision announced December 14, 1962, a Federal Trade Commission Hearing Examiner ruled that Central Arkansas Milk Producers Association, Inc., (CAMPA) and its secretary-manager, David L. Parr, had unlawfully coerced Arkansas processing plants to purchase all their raw milk from CAMPA, had illegally prevented processors from acquiring milk from other sources, had unlawfully imposed surcharges on milk sold by them, and had given discriminatory prices to favored purchasers.

Holding that this coercion is in restraint of trade and that the discrimination in price tends to lessen competition, the Examiner issued an order which would require respondents to discontinue these unlawful practices.

However, the Examiner refused to find that they had participated in a conspiracy in restraint of trade as alleged in the FTC's complaint of May 5, 1961.

This is not a final decision and may be reviewed by the Commission.

According to the Examiner, CAMPA is an agricultural cooperative association, authorized to act under a U. S. Department of Agriculture order regulating the handling of milk in the Central Arkansas marketing area. It sells raw milk produced by its 1,250 to 1,500 members and others in Arkansas, Louisiana, Texas, Oklahoma and Missouri to milk processors all over the State of Arkansas. CAMPA has among its membership a majority of the producers of raw milk both in numbers and in quantity of production operating in Arkansas.

He found that respondents had used their power and strength and their control of these producers to compel, by threats and intimidation, processing plants in the State to purchase all of their milk from CAMPA and had prevented these processors from acquiring milk from non-members of CAMPA or from producers and cooperatives outside the State of Arkansas. Processors had also been compelled to pay to CAMPA whatever prices it demanded for the milk, regardless of provisions in Department of Agriculture milk marketing orders providing for minimum prices per hundredweight or concessions made to their competitors.

CAMPA, he continued, added to such minimum prices additional charges such as premium payments with the represented purpose of increasing production, bulk-tank premiums represented to be reimbursement for costs incurred by producers in the installation of bulk tanks, so-called

"administrative" surcharges from processing plants which were not required to pay such charges because they were not subject to a Federal milk marketing order, and haulage or delivery charges customarily and invariably not constituting an element in the price of raw milk.

The Examiner also found that respondents had forced a processor in Batesville to accept a full supply contract and compel his producers to join CAMPA, and also threatened a processor in Crossett that if he stopped buying CAMPA's milk, they would "break" him.

Ruling that these activities are unfair methods of competition under the FTC Act, the Examiner pointed out that a "mere combination of all milk producers into an association for the purpose of bargaining collectively, obtaining a fair and reasonable price and equitable terms for their milk and agreeing to sell only to those willing to pay accordingly while refusing to sell to others not so willing to pay is not illegal, and undue price demands would be braked by the perishability of milk" and the power of the Secretary of Agriculture to take action to prevent such prices under 7 U.S.C. 292.

However, he stated, if a milk cooperative and its officials go beyond this and intimidate a processor to the point where that processor has no alternative but to buy all his milk from the cooperative at the price set by it so that he may have a supply of milk without fear of commercial ruin and then is compelled, in turn, to induce his suppliers of milk to join the cooperative against their will, then the cooperative goes beyond the status it has been accorded by the Capper-Volstead Act and Section 6 of the Clayton Act.

If such a cooperative, he continued, in the marketing of its milk, favors some processors over others by selling its milk, or the milk which it is selling on behalf of its members, at discriminatory prices and then the unfavored customers suffer economic disadvantages which could injure, destroy or prevent their competition with the favored customers, the cooperative also goes too far and beyond the exemption and protection accorded to it by such laws.

Among others, the Examiner rejected contentions by CAMPA that as an agricultural cooperative it is exempt from these proceedings by various laws, that respondents are not engaged in interstate commerce, and that CAMPA is merely an agent for its member farmers.

Stressing that the milk business in Arkansas is a very highly competitive business and that an extra cost of as little as four cents per hundredweight has a material effect on the ability of a processing plant to operate and to compete with other plants, the Examiner said that the "inducement or incentive premiums over and above the minimum Class I [highest use] or order price for milk demanded by and received by

respondents have varied from as low as one cent per hundredweight to as high as 62 cents per hundredweight, and most often have been more than 20 cents per hundredweight and less than 40 cents per hundredweight over and above the minimum order prices. With few exceptions, the minimum order prices were most often at a figure between approximately $5.00 and $5.50 per hundredweight in the years from 1956 and 1961, inclusive. The bulk-tank premiums or charges, when imposed and paid, were 15 cents per hundredweight, the so-called 'administrative' surcharge, when imposed and paid, was four cents per hundredweight. The haulage charge involved in this proceeding was $29.00 a load."

Continuing, he held that respondents "misused their legal monopoly by compelling some of the processing plants to make payments to them for milk at prices per hundredweight which included in some cases a premium either not charged to their competitors or not as low as that charged to their competitors, in other cases a four-cent administrative charge which they, as unregulated processing plants, were not required to pay, and thirdly, a $29 per load hauling charge to one processor which was charged no other customer of the respondents."

The Examiner said that respondents had failed to establish that the lower prices allowed to some of their customers and not allowed to others were made "in good faith to meet equally low prices of any competitor or any services or facilities furnished by any competitor." He also pointed out that some of the lower prices were below the minimum prices set in the milk marketing orders so were illegal.

The Examiner said that the form of the order to be entered presents no problem as far as Section 5, Federal Trade Commission unfair acts and practices are concerned. "Superficially, because of location differentials for which provision is made in Federal milk marketing orders, it may be suggested that an order requiring uniform prices to processors may be in conflict with such marketing orders. I have concluded that this is illusory and that the only problem created is for CAMPA to reorganize the structure of its business, revise the gerrymandering of producers' pools and possibly, but not necessarily, to go back to a true agency status. The same is true with respect to respondents' activities in widely separated and far flung areas and places. The marketing pools for which provision is made under the milk orders are sensible and practical solutions of the complicated problems connected with the production and marketing of milk. There would be no problem about operating under these orders if there were a true vendor-vendee relationship between farmer-producers and processing plants and if cooperatives and processing plants did not get so big as to stretch their tentacles beyond the boundaries of the marketing areas in which the plants are located. . . . The mechanics of this are for consideration of and solution by the respondents even though

the ultimate result may be a cutting back or scaling down of the size of milk producers' cooperatives and a revision of their marketing procedures. This matter of size is a vice not confined alone to the producers' cooperatives. It is also a vice of large processors. . . . If such processors want to expand their operations to distant places where competition of other marketing areas is encountered, they should finance such expansion and meet such competition out of their own resources or facilities and not at the expense of the processors who happen to be located in the area where their plants happen to be located."

As to a cease and desist order prohibiting price discrimination, he said that "a pricing order can be and should be drawn along the conventional lines which have been the pattern for other orders under Section 2(a) of the Clayton Act."

In dismissing the conspiracy charge, the Examiner commented that there "is much testimony by many witnesses as to how prices, particularly prices including premiums, were determined or arrived at. It has been noted already that once a price was determined, the processing plants were told that was the price and they had to pay it. Surely there were meetings from time to time. These meetings were attended only by the representatives of the largest processing plants, but they were nothing more than talk sessions with the CAMPA representatives saying they wanted more money and the plant representatives saying they did not want to pay so much. It is probably true, also, that a price never was finally concluded until Parr, in his own words, 'went all around the mulberry bush' talking separately and privately to individual plant officials, ultimately getting one of them to break first and agree on a price. Thus were prices made in the milk industry in Arkansas.

"The record does not show, and it leaves the door open to suspicion, that it was in these private conversations while Parr was going 'around the mulberry bush' that the log rolling was done and the special deals for lower prices and price differentials were made. Such suspicions have the aura of conspiracy. But the Hearing Examiner, who is quite familiar with the laws governing conspiracy and knows that conspiracies are developed under cover by tacit understandings without letter writing, without agreement and by courses of conduct, in this particular case just is not satisfied with the proof that a conspiracy or conspiracies did exist here."

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MONOPOLIES AND RESTRAINTS OF TRADE - MILK ASSOCIATION HELD IN VIOLATION OF SHERMAN ANTITRUST ACT

(North Texas Producers Association v. Keith Young, CA 5, 308 F. 2d 235 (1962))

The Court of Appeals for the Fifth Circuit, in affirming the judgment of the District Court for the Northern District of Texas, held that an agreement of North Texas Producers Association (hereafter called "North Texas"), a milk producers association, with handlers and distributors to breach a supply contract with a new milk distributor to stop him from entering the milk business was a restraint of trade and monopolization in violation of the Sherman Antitrust Act. The Court held that the milk distributor was injured in his "business or property" and a valid contract is "property".

In July 1956, Young and North Texas entered into a contract by which North Texas agreed to sell milk, bottled in one gallon glass containers ready for distribution, to Young. Before the contract could take effect Young was to secure the necessary permits to do business in the area and permits to use a particular type of label that was required in the area.

In November 1956, Young was informed by North Texas that they would not go through with the contract. The chief reason for the refusal to perform the contract, Young alleged, was that the other milk handlers and distributors in the area objected to it, and they made an agreement with North Texas to pay an additional one cent per quart for milk if North Texas refused to sell milk to Young.

Young also alleged that, for some time prior to the breach of the contract, North Texas had been trying to induce the distributors and milk handlers to pay it a premium for Class I milk over the Federally regulated minimum price. Young contended that the distributors were anxious to upset the North Texas-Young contract and they reached an agreement with North Texas whereby North Texas would refuse to perform the contract with Young they would increase their price to North Texas by a sum of 40 cents per hundredweight. As a result of this increase, the wholesale price of milk in Texas was raised wherever a Federal marketing order was in effect, including the Dallas-Fort Worth area. There was evidence to the effect that over a four month period the price increase was worth approximately one and a half million dollars to North Texas.

In December 1958, Young filed a suit in the District Court alleging a conspiracy between certain named distributors and individuals to refuse to sell him processed Class I milk bottled in one gallon glass containers. The jury found for Young and awarded damages in the amount of $100,000, which were trebled by the Court, to which was added attorney's

fees, and judgment with interest was rendered accordingly. North Texas appealed asserting that Young did not state a cause of action under the antitrust laws and suggested an action for simple breach of contract.

The jury found in effect, that on November 2, 1956, Young was prepared and had intended to enter the milk business in the Dallas-Fort Worth area under a contract with North Texas and on that date North Texas entered into a contract, combination or conspiracy with one or more handlers and distributors in the area. The handlers and distributors agreed to pay an increased price for milk they purchased from North Texas from November 5, 1956, to February 28, 1957, on condition that North Texas would refuse to sell to Young; the arrangement between the distributors and handlers and North Texas was a restraint of trade of commerce; and assessed the damages suffered by Young at the sum of $100,000.

In the appeal, North Texas cited Duff v. Kansas City Star Co., 299 F. 2d 320 (8 Cir., 1962), stating that unless a person is "injured in his business or property" he has no cause of action under the Clayton Act.

The argument of North Texas, which was identical to the argument in Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, was rejected by the Court. The Court said it agreed with the holding in that case:

> "Section 4 of the Clayton Act authorizes the recovery of treble damages by any person who is injured in his 'business' or 'property' by reason of anything forbidden by the anti-trust laws. Defendants contend that since plaintiff never actually engaged in business, it had no business within the intendment of Section 4. Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a stand-still. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail S.S. Co., 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the word 'business' is unwarranted in the context of its Clayton Act usage."

The Court found that:

> "We see no conflict in the holding of the Duff case with the decision reached here. First, the Duff case presents facts entirely different from those under consideration here. Indeed, the trial court likened the plaintiff in Duff to a stranger who might enter Kansas City 'with the desire or wish' to enter the newspaper publishing field; which is to say, that the 'desire or wish' is all the stranger had. No property was involved. In effect, the court held that there was no established business (good will) to which the name or trademark there involved attached and then stated: 'If none exists, then there is no property right in the name.' The court anchored its opinion to former holdings of the Eighth Circuit:
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> > "'* * * /It is settled/ in this circuit that there is no such thing as property in a trademark except as a right appurtenant to an established business or trade with which the mark is employed * * *'
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> "In addition to holding that after 8 years of non-publication, the plaintiff possessed 'neither business nor property, including good will, which could have been damaged by appellees' monopoly within the period of limitation', the concluding statement in the opinion is a quotation from the opinion of the trial court holding that the plaintiff's action was barred by the statute of limitations.
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> "Keith Young was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to engage in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. The alleged conspiracy stopped him cold in November. It is our opinion that Young was 'injured in his business or property'. A valid contract is property."

The Court concluded as follows:

> "In summary we hold that this case was tried in a fair and just manner by the distinguished trial court and we agree with the trial court that the facts decided by the jury are amply supported by substantial evidence. Under the applicable rules, there is no justification to disturb the facts found and further, we are persuaded that the conclusions reached by the jury are just and proper. The record in this case clearly demonstrates that there has been a violation of

the Federal antitrust laws in a positive, direct and flagrant manner. By combination and conspiracy, the milk handlers and distributors together with North Texas combined to stop Keith Young from entering the milk business in the market area involved and they accomplished what they set out to do. Their conduct was restraint of trade and they did monopolize. The public was injured in a real and vital sense because the price of milk was maintained at the level which the conspirators decided to maintain it. Competition was stifled and eliminated. North Texas gained its reward for its action by receiving an increase in the price it was receiving for the product it sold. Keith Young was damaged because he lost a contract -- destroyed by combination and conspiracy; and he lost the opportunity to proceed with the contract according to its terms. The competition he could have provided with the prices and gallon containers which North Texas agreed to supply was eliminated."

On October 17, 1962, the Court of Appeals denied a petition for rehearing in this case.

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FEDERAL TAXATION - GAINS ON THE SALE OF REVOLVING CERTIFICATES HELD CAPITAL GAINS NOT ORDINARY INCOME

(Tomlinson v. Massey, CA 5, 308 F. 2d 168 (1962))

The Court held that a patron who had sold his revolving fund certificates in 1949 and received an installment payment thereon in 1951 was entitled to treat the amount received as a capital gain under the law and regulations then in effect. It said that the Treasury's 1959 regulations, which expressly provided that such gains "shall be included in the computation of the gross income of the patron, as ordinary income, in the year of * * * disposition" had no application to the instant case. Accordingly, it did not find it necessary to pass upon the constitutionality of the 1959 regulation.

Portions of the Court's opinion are extracted below:

"It will contribute to a better understanding of the issue in this case if we first consider the back history of the activities of the Internal Revenue Service with reference to tax liability on funds retained by the cooperatives, which were represented by the withholding and revolving fund certificates. Originally the Internal Revenue Service took the position that contingent patronage payments evidenced by withholding and

revolving fund certificates were income to the recipients when issued. However, the courts uniformly rejected the Commissioner's attempt to impose taxes on these truly conditional certificates that had no cash value when issued. Certificates which were similar to the retain and revolving fund certificates in the case at bar have been held by three Courts of Appeals, including this Court, not to represent income taxable against the holder in the year received. Fountain City Coop v. Commissioner, (7th Cir., 1949) 172 F. 2d 666; Commissioner v. Carpenter, (5th Cir., 1955) 219 F. 2d 635; Long Poultry Farms v. Commissioner, (4th Cir., 1957) 249 F. 2d 726.

"Following the decisions in these cases holding that the retain and revolving fund certificates were not taxable against the recipients in the year received, the Commissioner assessed income taxes against the cooperatives receiving and withholding the funds. * * * /I/n 1947 the co-op association involved in this case were required to pay income taxes from the period they first came into existence through 1945 as taxable income on the funds withheld for which certificates had been issued.

"When the co-ops sold their physical properties to the Pasco Packing Company in 1947 and finally wound up holding shares of stock of that company in payment of the properties acquired, the Internal Revenue Commissioner imposed and collected capital gain taxes represented by the difference in the $100.00 par value of the stock which was exchanged at par and the claimed $137.50 market value, which the Commissioner designated as taxable income. The two associations brought suit to recover the taxes assessed by the Commissioner on this difference. The trial court held that the cooperatives did not realize any taxable income on these transactions and the Commissioner was required to refund the taxes collected. Pasco Packing Association v. United States and Pasco Growers Association v. United States, decided June 26, 1957, by the District Court for the Southern District of Florida. * * * /This case is reported in Summary, Legal Series No. 3, December 1957, p. 32./

"/Commissioner/ introduces his argument * * * with the following statement:

> "'When the Internal Revenue Service accepted in 1959 the principle that income was not realized upon receipt of conditional patronage payments, it was faced, for the first time, with the necessity of prescribing rules specifying the subsequent event which would cause

> this day-by-day and normal business income to be realized for income tax purposes. * * *
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> "'Thus in amending Section 29.22(a)-23(b) of the Regulations to accord with the dicta of these courts, it was expressly provided that such gains "shall be included in the computation of the gross income of the patron, as ordinary income, in the year of * * * disposition".' * * *

"We hold that /patron's/ tax liability for the year 1951 is to be determined in conformity with the law and the regulation then in force and not by the regulation of December 2, 1959. Helvering, Commissioner of Internal Revenue v. R. J. Reynolds Tobacco Co., 306 U.S. 110. The regulation promulgated in 1959, even if attempted to be made retroactively applicable to this case, must yield to the controlling statute. Long Poultry Farms, Inc. v. Commissioner, 249 F. 2d 726; Manhattan General Equipment Co. v. Commissioner, 297 U.S.129.

"We therefore find it unnecessary to pass upon the constitutionality of this regulation as it does not and cannot change the law applicable to the case. * * * The parties are in agreement that the certificates which taxpayer sold do not fall within any of the excluded categories of Section 117(a) of the Internal Revenue Code, which defines as capital assets all property except such excluded categories. * * * The parties stipulated * * * that 'the retain certificates when issued represented the risk capital of the association and no subsequent corporate event changed the character of those certificates.' At this point they ceased to have any of the indicia of postponed income or of anything except what they were - permanent investments in the ownership of the fixed assets of the cooperatives. C.f. Moberg v. Commissioner of Internal Revenue, 5 Cir., 305 F. 2d 800."

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FEDERAL TAXATION - CAPITAL CONTRIBUTIONS - PAYMENT FOR SERVICES

(United Grocers, Ltd. v. United States, CA 9, 308 F. 2d 634 (1962))

The District Court's decision in this case (see Summary, Legal Series No. 14, September 1960, p. 55) was affirmed in the cited decision of the United States Court of Appeals, Ninth Circuit. The Court of Appeals concluded, as had the lower court, that initiation and membership fees grocer patrons of this wholesale grocery buying cooperative were required to pay to acquire and maintain membership were not capital contributions excludable from gross income under Section 118(a) of the Internal Revenue Code of 1954.

The Court said in part:

> "Counsel for both parties rely upon decisions of the Supreme Court, /Government/ upon Detroit Edison Co. v. Commissioner, 1943, 319 U.S. 98, 63 S.Ct. 902, 87 L.Ed. 1286, and /Cooperative/ upon Brown Shoe Co. v. Commissioner, 1950, 339 U.S. 583, 70 S.Ct. 820, 94 L.Ed. 1081. In Detroit Edison the court held that payments by farmers and other customers to the utility for an extension of its facilities were not gifts or contributions to the company, but 'were to the customer the price of the service'. In Brown Shoe, it was held that cash and other property received from certain community groups as inducements to the location or expansion of the taxpayer's manufacturing operations in the communities were contributions and that taxpayer accordingly was entitled to deductions on account of depreciation. * * *
>
> "It is true, as /Cooperative/ contends, that the payments were not made for the purpose of goods or services, but solely to qualify a member to share in patronage dividends. Obviously, however, the dominant purpose for members was to obtain merchandise and services at the lowest possible prices. While members and non-members were billed for the same amount the members in effect received reduced prices through the patronage dividends. Each member was a retail grocer who, as a practical matter, was not interested in an investment or the well-being of /Cooperative/, except as an incident to his need to purchase groceries at advantageous and competitive prices. It is reasonable to assume that a member would continue to pay the fees and monthly assessments only so long as the total amount paid remained less than the cost of similar

merchandise and services elsewhere. As was said in Detroit Edison, 'The payments were to the (member) the price of the service.'

"There was no motive to benefit the general community, as in Brown Shoe. Nor was there any investment motive, since the member acquired no equivalent equity interest in the cooperative. A member who paid $90 annually for many years would have no greater interest upon liquidation than a new member who had made his first monthly payment. Any member who withdrew prior to liquidation would forfeit his right to share in the property of the corporation. While the acquisition of an increased equity or interest in the corporation is not a requisite of a capital contribution, the presence or absence of such interest has a bearing upon the motive of the person making the payment.

"The district court correctly concluded that since members were required to make the payments in question 'as a condition of the entitlement of its services, patronage dividends or otherwise', they must be held to be payments for those services unless evidence shows that the 'contributions carry other entitlements apart from the services and so characteristic of capital contributions as to negative mere payment for services as their exclusive or primary purpose'."

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TRANSPORTATION - MOTOR CARRIERS - GRANDFATHER RIGHTS INVOLVING EXEMPT AGRICULTURAL COMMODITIES PRIOR TO AMENDMENTS IN TRANSPORTATION ACT OF 1958

(Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (1962);
Ballentine Produce, Inc. v. United States, 209 F. Supp. 679 (1962))

In the two cases cited, essentially the same basic issues were involved: Did frozen cooked vegetables constitute exempt agricultural commodities prior to the amendment of section 203(b)(6) of the Interstate Commerce Act by the 1958 Transportation Act.

In the Newton case a three-judge statutory court upheld the Interstate Commerce Commission ruling in MC-C-2522, Frozen Cooked Vegetables - Status. In that case the Commission ruled:

"* * * The term * * * prior to the amendment * * * did not include frozen French fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen French fried onion rings, frozen pre-cooked pouch-packed vegetables in general and frozen pre-cooked pouch-packed vegetables with sauce in particular.

"We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than necessary for the inactivation of the enzymes (blanching); any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

Accordingly, the Court denied plaintiffs any "grandfather rights" with respect to such products.

In the Ballentine case, plaintiff had been hauling prior to May 1, 1958, under his certificate "frozen sweet potatoes," "frozen creme peas," "frozen candied yams," "frozen French fried potatoes," and "frozen sweet potato patties." He brought this action to enjoin enforcement of a certain order of the Interstate Commerce Commission served August 29, 1961, and allegedly implemented by Field Staff Information Bulletin No. 16, dated September 7, 1961, on the grounds that they "have operated to exclude the above listed products from the scope of the certificate."

The Court said, in summary:

"From our consideration we have come to the conclusion that while in a broad sense we have jurisdiction of the subject matter of the action since it is a suit to enjoin enforcement of an order of the Commission, nevertheless, the particular order here involved is not a reviewable order, and that even if it were this Court could not at this juncture afford plaintiff any relief. It follows that the complaint should be dismissed but without prejudice to the right of plaintiff to seek relief in a direct proceeding before the Commission with the right to return to this Court should direct proceedings before the Commission turn out to be unsuccessful."

Accordingly, the complaint was dismissed.

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TRANSPORTATION - MOTOR CARRIERS - GRANDFATHER RIGHTS

(Winter Garden Co., Inc. v. United States, 211 F. Supp. 280 (1962))

In this case a three-judge statutory court held that frozen fruit and vegetable carriers whose common and for-hire operations were not separately conducted before Transportation Act of 1958 subjected them to Interstate Commerce Commission's regulation cannot be required by Commission to segregate common and for-hire haulage since such restriction would deprive carriers of right under Act's "grandfather" clause to continue performing substantially same operations.

The court's ruling turned entirely on its interpretation of the "grandfather" clause in the Motor Carrier Act of 1935.

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TRANSPORTATION - MOTOR CARRIERS - "COOPERATIVE" EXEMPTION

(Interstate Commerce Commission v. Nelson Cooperative Marketing Association, 209 F. Supp. 697 (1962))

This action was brought by the Interstate Commerce Commission to prohibit the defendants from transporting property by motor vehicle in interstate commerce for compensation until the defendants obtained the necessary authority to engage in such transportation as required by the Interstate Commerce Act. The District Court granted the injunction holding that the defendants were not a "cooperative association" within the provisions of the Agricultural Marketing Act, and therefore were not exempt from economic regulations of the Interstate Commerce Commission and were subject to economic regulations imposed by the Interstate Commerce Commission on common carriers by motor vehicle.

Nelson Cooperative, incorporated under the "Cooperative Marketing Association Act" of Oklahoma, is a non-stock corporation with a five-member Board of Directors which is its entire voting media. Nelson Cooperative operates on so-called "agency agreements" with truckers. These agents receive a commission based on the percentage of traffic obtained by them for Nelson Cooperative. Any farming activities which these agents engage in are unrelated to the operations of the Nelson Cooperative.

The transportation performed by Nelson Cooperative is for canneries, meat packing houses, produce dealers, and other persons who are not eligible for membership in the cooperative because they are not engaged in farming operations. The traffic consists of manufactured or processed items, such

as canned goods and processed meats, as well as "exempt" commodities such as livestock, produce, grain and other agricultural commodities. Most of the transportation of nonexempt manufactured or processed items involves the movement of canned goods from canneries to wholesale and retail grocers and processed meats between packing houses, meat brokers, and other dealers in meats.

Over 90 percent of the total value of the transportation is performed with or for nonmembers or registered members not eligible due to the nature of their operations. Nelson Cooperative does not attempt to determine whether the shippers submitting traffic to them are engaged in farming operations. Nelson Cooperative solicits shippers as nonvoting members by use of an application form which is incorporated in the shipping documents. Members are accepted upon payment of a nominal membership fee. As a result, the membership of the association consists largely of persons who are not farmers and, therefore, are ineligible for membership in the association.

In reaching its conclusion the Court said, in part:

> "Whether the operations of Nelson Cooperative are entitled to the so-called 'agricultural cooperative exemption,' Section 203(b)(5) of the Interstate Commerce Act, depends on whether it qualifies under the Agricultural Marketing Act (Title 12, §§ 1141-1141j, U.S. Code). Section 1141j defines the term 'cooperative associations' as it is used in the Agricultural Marketing Act. Section 1141 declares the purpose of the Marketing Act to be the promotion of the effective merchandising of agricultural commodities through producer-owned and producer-controlled cooperative associations.
>
> "For Nelson Cooperative to come within the meaning of the Agricultural Marketing Act, it must be owned and controlled by farmers acting together for their mutual benefit to promote the merchandising of their farm products by means of 'processing, preparing for marketing, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services.' Such an association either must grant members equal voting privileges or restrict its dividends to 8 percent per annum. In any case, such an association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members.

"A 'farmer' is a person, natural or corporate, actively engaged in farming operations to some extent. Persons or corporations engaged in businesses such as canneries, meat packing houses, dealers in produce, and other like businesses, do not qualify as farmers solely because farm products are used by them as raw material in their manufacturing processes. Similarly, manufacturers and dealers in farm implements and farm supplies do not qualify as farmers merely because their products may be used on a farm or by a farmer. Business transacted with such nonfarming entities is not member business for the purposes of the third proviso of Section 1141j. See, Machinery Haulers Association, et al. v. Agricultural Commodity Service, 86 M.C.C. 5. The views of the Commission are persuasive and entitled to special consideration, particularly in light of the absence of legal precedents. Levinson v. Spector Motor Company, 330 U.S. 649, 672, 67 S.Ct. 931, 91 L.Ed. 1158; McLean Trucking Company v. United States, 321 U.S. 67, 87-89, 64 S.Ct. 370, 88 L.Ed. 544; United States v. American Trucking Association, 310 U.S. 534, 549, 60 S.Ct. 1059, 84 L.Ed. 1345.

"Nelson Cooperative does not qualify as a cooperative association in eacn of the following respects. First, it is not a producer-controlled association. Second, its primary purpose is not the marketing of farm products of, or the furnishing of farm business services to its members. Third, it is dealing in services with or for nonmembers in an amount greater in value than that transacted with or for eligible members, contrary to the third proviso of Section 1141j, Title 12 U.S. Code.

"Notwithstanding the above findings and conclusions, the transportation of canned goods from canneries to grocers and chain stores, of processed meats from packing houses to meat dealers, of cheese from brokers to distributors, and other transportation which is not necessary to farming activities of member farmers are activities in which even a bona fide cooperative association may not rightfully engage.

"Under the precepts of the Agricultural Marketing Act, a cooperative association must act for the mutual benefit of its members in their capacities as farmers and in furtherance of their marketing of farm products or purchase of farm supplies and farm business services. Transportation performed by such an association must directly benefit the farming operations of its members regardless of whether the services are performed for members or nonmembers. This is not the case here.

> "This decision is not adverse to <u>Interstate Commerce Commission v. Jamestown Farmers Union Federated Cooperative Transportation Association</u>, 151 F. 2d 403, wherein the Eighth Circuit ruled that transportation performed by a cooperative association may connect at origin or destination with a member cooperative association as well as a farm. In that case, there was no question of the status of the association or the eligibility of its members and all of the transportation was performed for eligible members.
>
> "The operations of Nelson Cooperative * * * constitute those of of a common carrier by motor vehicle as defined in Section 203 (a)(14) of the Act (Title 49, § 303 (a)(14), U. S. Code), and its transportation of property other than so-called 'exempt commodities' is in violation of Section 206(a) of the Act (Title 49, § 306(a), U. S. Code), and as such subject to be enjoined by the court under the express provisions of said Act; and, that the relief prayed for by the plaintiff against Nelson Cooperative should be granted."

Accordingly, the Court held that the Interstate Commerce Commission was entitled to be granted the injunction against Nelson Cooperative.

The rather sweeping dictum of the Court as to certain activities "in which even a bona finde cooperative association may not rightfully engage" would appear to overlook the possibility that a "bona fide cooperative" of agricultural producers might operate a cannery or a packing house. It would seem that under such facts the farmer cooperatives "in furtherance of their marketing of farm products" could rightfully transport their own canned goods or processed meat.

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TRADE REGULATION - PRICE DISCRIMINATION

(In the Matter of The Borden Company, FTC Docket No. 7129)

The Federal Trade Commission has ruled in this case that: (1) greater market place value attributable to a food packer's brand name is not sufficient to render physically identical evaporated milk sold at lower price under "private labels" of different "grade and quality" for purposes of the Robinson-Patman Act's price discrimination ban; and (2) the packer's price differentiation justification was inadequate and unacceptable because (a) it was based upon broad cost and price averaging that did not distinguish between various classes of customers and did not "show sufficient homogeneity in the classifications" and

(b) listed certain items as expense items which cannot properly be used for cost justification under the Robinson-Patman Act. Accordingly, it held that Borden had engaged in unlawful price discrimination and ordered it to stop discriminating in price in selling any of its food products. This order is not a final order, since it authorized further proceedings on the proposed order. The Commission decision reversed a prior Hearing Examiner's decision.

Borden, the Commission found, has been selling Borden brand evaporated milk since 1892 and began packing under purchasers' private labels about 1938. During the period covered by the complaint (January 1, 1956 to March 31, 1958) the f.o.b. price of private label milk was consistently and substantially lower that the delivered price of Borden brand. For example, in March 1958 the delivered price of Borden brank milk from the company's Chester, South Carolina, and Lewisburg, Tennessee, plants was $6.60 per case and the f.o.b. price of private label stock was $4.9436. These differentials are not accounted for by differences in the cost of transportation arising from the f.o.b. deliveries and the destination deliveries.

Ruling that the Examiner erred in holding that the record failed to show competitive injury, the majority said: "this record does not show a complete market picture for the evaporated milk industry, but it does sufficiently develop the competitive situation as between respondent and the [seven] Midwest competitors [who testified in this proceeding]. Respondent by comparison to these competitors is a large and powerful concern. It has broad resources in that it sells a wide variety of food products both at home and abroad. Moreover, its sales of evaporated milk are principally under Borden brand, whereas the testifying competitors generally indicated that their evaporated milk sales were mostly private label. In other words, the testifying competitors were considerably more dependent upon private label evaporated milk sales than the respondent.

"Respondent's prestige and power in the market is illustrated by the fact, as the Examiner found, that private label customers came to respondent seeking a source of supply.

"On the other hand, the Midwest competitors are small companies with relatively small sales volumes of evaporated milk compared to the sales of respondent. They maintain a rather precarious hold in the market place. As we have seen, sales for evaporated milk diminished in the period disclosed by the record. Since 1950, at least ten concerns, mostly in the Midwest, have discontinued production of evaporated milk. There are no new concerns coming into the business.

"Under such circumstances, little is needed to shift the competitive balance. Respondent came into the market using a discriminatory pricing

structure. This has put a severe strain on the smaller competitors as some of them testified. In fact, the discontinuance of Dairyland Cooperative /one of the testifying competitors/ is tied to respondent's expansion in the field and its use of discriminatory prices. The testifying Midwest competitors all lost accounts to the respondent and it appears that the shift of business has been permanent.

"In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely. This is enough to satisfy the injury requirement of the Act."

Adding that the evidence shows Borden's price discrimination endangers competition between its wholesaler and retailer customers, Chairman Dixon stated, "The testimony from wholesalers as well as retailers disclosed the extremely low or nonexistent profit margins on evaporated milk. In most instances, wholesalers and retailers testified that evaporated milk was handled for accommodation to customers and not for profit. In fact, evaporated milk is used as a loss leader which indicates that discriminatory prices made it difficult for the unfavored customers to compete not only because of higher prices on that item but because it would tend to draw away customers for other products as well. Wholesale and retail witnesses testified to the effect that a lower price on respondent's private label goods, would have been of great value in improving profit margins and assisting in meeting the competition on this item."

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PUBLIC CONTRACTS - PROCUREMENT BY UNITED STATES - CONFLICT WITH STATE MINIMUM PRICE REGULATIONS

(*Paul* v. *United States*,
31 U.S.L. Week 4109 (U.S. Jan. 14, 1963))

The main question in this case was whether California could enforce her minimum wholesale price for "fluid milk" sold as respects milk procured at three military installations (Travis Air Force Base, Castle Air Force Base, and Oakland Army Terminal) located within California. The milk was used "for strictly military consumption, for resale at Federal commissaries and for consumption or resale at various military clubs and post exchanges." Milk used for the first two categories was paid for with appropriated funds, while that used by the clubs and exchanges was purchased with nonappropriated funds.

The United States Supreme Court held that the California minimum price regulations were in conflict with an Armed Services procurement regulation requiring Federal officers to procure supplies at lowest cost and, therefore, could not be enforced as to milk purchased with appropriated funds. As to that purchased with nonappropriated funds, the California regulation was held to apply if the particular military installation is not under United States exclusive jurisdiction or if the State regulation antedated the United States' acquisition of the particular installation.

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STATE MILK MINIMUM PRICE REGULATIONS - CONSTITUTIONALITY

(Polar Ice Cream and Creamery Co. v. Andrews,
208 F. Supp. 899 (1962))

In this case, somewhat related to the Paul case just discussed above, the United States District Court for the Northern District of Florida held that the Florida statutes and orders were distinguishable from the California situation and were not unconstitutional on the grounds of conflict with Federal procurement regulations. He construed the Florida laws and orders as containing no restriction on prices paid by the Federal Government for milk purchased for military reservations. This case has been appealed to the United States Supreme Court as of November 19, 1962.

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FEDERAL MILK ORDERS - HANDLER COMPELLED TO COMPLY

(United States v. Yadkin Valley Dairy Cooperative, Inc., 209 F. Supp. 634 (1962))

The United States District Court, in this case, granted the request of the United States for a summary judgment in its action against this cooperative to compel it to comply fully with the Agricultural Marketing Agreement Act and provisions of a milk marketing order issued thereunder. This involved, also, payment of its assessments for the Producer's Settlement Fund and Administrative Fund and a permanent injunction restraining subsequent violations.

The Court held that the United States was entitled to the relief sought where the market administrator had determined that the order applied to the handler and that the handler, which had begun action in pursuit of its administrative remedies, had violated provisions of the order. The necessary facts to support these points were admitted, the Court said by the defendant's Motion to Dismiss. It said, in part:

> "It seems clear that defendant's objections to the payment of these sums are not properly before this court at this time. In an action to enforce an obligation imposed under a milk marketing order, the district court lacks jurisdiction over the merits of any defense asserted, since the act requires the handler to assert such defense initially in an administrative proceeding and thus exhaust the available administrative remedies. In this enforcement proceeding, defendant may not contest the validity of the marketing order or any of the obligations imposed thereunder since the defendant is provided by the Agricultural Marketing Agreement Act, 7 U.S.C.A. § 608c(15)(A), (B), with an administrative and judicial remedy to consider those issues.
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> * * * * *
>
> "Defendant has already begun an action in pursuit of its administrative remedies under 7 U.S.C.A. § 608c(15)(A). A decision is pending in that action. It is in that action that defendant may properly challenge the provisions of the milk order as 'not in accordance with law,' and otherwise deal with the merits of the case. Only after a ruling in that forum, and the administrative remedies having thus been exhausted, is this court vested with jurisdiction under § 608c(15)(B) to hear defendant's challenge that the order is not in accordance with law.

"Nor does the fact that a ruling is pending in the administrative hearing deprive this court of the power to act in the present case. Section 608c(15)(B) provides that 'the pendency of proceedings instituted pursuant to this subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608z(6) of this Title.' "

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MILK MARKETING ORDERS - "COMPENSATORY PAYMENTS" - PROVISIONS HELD INvALID

(Knudsen Brothers Dairy, Inc. v. Freeman,
303 F. 2d 886

On October 15, 1962, the United States Court of Appeals for the Second Circuit denied the Government's petition to rehear in the case of Knudsen Brothers Dairy, Inc. v. Freeman. (See Summary, Legal Series No. 22, p. 50, for report of this case.) It was contended in the Government's petition for rehearing that there are material factual distinctions between the "compensatory payments" provisions in this case and Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76, and that, in view of the differences in the facts, the case should be remanded to the District Court in order to afford it "an opportunity to consider the extent to which the principles laid down in Lehigh Valley have application to the particular circumstances of this case."

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